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## Reaction: The UK's EU Renegotiation Demands

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*Today, UK Prime Minister David Cameron sent a [letter](#) to the President of the European Council outlining his agenda for renegotiating the UK's membership of the European Union, ahead of a referendum on the issue. He also gave a [speech](#) explaining the demands in more detail. Our experts react to the proposals in the letter and the speech, assessing the probability of success in achieving them and their potential impact on relations between the UK and the EU.*

**Laura Cram** | Sovereignty and Ever Closer Union

Flexibility is what Prime Minister David Cameron has focused on. Ironically, this is perhaps the quality most associated with the shape-shifting EU.

A European Union of concentric circles, variable geometry and multiple speeds was never heading in only one direction. Instead, it has always allowed, even relied upon, differentiated patterns of integration for different Member States.

The question of sovereignty has always been at the heart of the relationship between the EU and its Member States. Indeed, the broad commitment to 'ever closer Union' was primarily a means of dodging the inevitable conflict that more binding institutional outcomes, like progress towards a federal structure, would have generated.

Existing attempts to enhance the role of national parliaments and the separate, but closely related, long-standing commitment to enhanced subsidiarity (at least in theory) suggest that the PM is pushing at an open door here.

However, countries such as France have an incentive to resist any unpicking of the broad commitment to integration, as that could fuel internal populist demands there.

The PM should also be careful what he wishes for. National parliaments and devolved administrations have often found extensions of their rights to scrutinise EU legislation to be onerous and resource-intensive.

Nor is it universally agreed that such reforms are the democratic magic bullet that they are often portrayed to be.

**Owen Kelly | The Business Perspective**

Like Cameron's Bloomberg speech three years ago, today's letter and this speech, taken together, appeal to a range of audiences and try to give each something for all to cheer.

From a business perspective, 'flexibility' (the Prime Minister's one-word summary of what he is looking for) is generally seen as a virtue unless it leads to uncertainty.

He identifies the elephant that has been in the room for some time – namely the relationship between the Eurozone and Member States outside it. He asserts that its economic governance should be a service to the EU as a whole.

The focus on competitiveness is very business-friendly, but some of what he asks for is happening anyway. Legislative output is no longer a measure of success for European Commissioners, for example. There is also recognition in Brussels that the cumulative impact of regulation needs to be assessed.

There is tension between his enthusiasm for the single market and the Capital Markets Union – both of which depend on free movement of different kinds of resource to support economic growth wherever market preferences seek it – and his desire to limit immigration.

However, that tension is not new and it is essentially political in nature.

**Niamh Nic Shuibhne | Welfare Benefits**

To appreciate the context and scale of the challenges ahead in restricting welfare benefits for EU citizens, the critical distinction in EU free movement law between *social and tax advantages* and *social assistance* is an important starting point.

Under current EU law, it is already possible to place restrictions on access to social assistance. This can take place where EU citizens are, in the language of EU case law, 'economically inactive'.

Social assistance is defined under EU law as 'all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family' (Case C-333/13 Dano, Para 63).

However, for EU nationals who work in other Member States, Article 7 of the EU Regulation on Freedom of Movement for Workers within the Union (Reg 492/2011) requires that workers from other Member States 'may not...be treated differently from national workers by reason of [nationality] in respect of any conditions of employment and work' and, furthermore, 'shall enjoy the same social and tax advantages as national workers'.

Equal treatment in this respect is a longstanding and integral feature of the prohibition on discrimination on nationality that has always been enshrined directly in the EU treaties.

In short, what a Member State provides for its own national workers, it must provide equally for EU workers. Reframing that obligation is likely to require, in turn, amending the treaties.

One option might be to replicate the existing language in Article 21 of the Treaty on the Functioning of the European Union (TFEU) for the free movement of citizens in Article 45 TFEU for workers. This would state that free movement rights for workers are ‘subject to the limitations and conditions laid down in the Treaties *and by the measures adopted to give them effect*’.

An amendment along these lines would enable legislative decisions to be taken subsequently, on an issue-by-issue basis. But it postpones rather than removes the associated political challenges.

### Ever Closer Union

The suggestion of an opt-out for the UK from the ‘ever closer union’ phrase in the EU treaties presents a number of difficulties. For example, first, the phrase appears in the preambles to both the Treaty on European Union (TEU) and TFEU – how do you opt out of a preamble?

Second, the wording in Article 1 TEU reflects precisely a central ambition of the UK negotiating position, since it provides that the treaty ‘marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen’.

One workable solution might be not to pull away from the language of the treaties but, instead, to seek more consciously to reinforce it – to emphasise the words normally left out of ‘ever closer union’ discussions and consider a declaration that reaffirms that an ever closer union *among the peoples of Europe* neither embodies, implies nor requires a political union of *States*, nor in or of itself challenges their sovereignty in particular ways.

### Eleanor Spaventa | Free Movement Abuse

As had been widely anticipated, David Cameron’s letter includes migration, demanding a ‘crack down on the abuse of free movement’.

He says that he wants ‘tougher and longer re-entry bans for fraudsters and people who collude in sham marriages’. He also plans to address the fact that it is easier for an EU citizen to bring a non-EU spouse to the UK than it is for a UK citizen.

The Prime Minister is seeking more powers to deport criminals, prevent their entry and re-entry to the country. He also wants take on rulings from the European Court of Justice which have allegedly made it more difficult to tackle this kind of abuse by widening the scope of free movement.

The Citizenship Directive (2004/38) already allows Member States to terminate or withdraw EU rights in cases of abuse or fraud (including marriages of convenience). However, it does not define what an abuse of rights means.

The Court has said that migration in order to use an EU right is not in itself an abuse of Union law. This includes family reunification rights or entering employment with a view to qualifying for university funding.

Most of these concerns relate to the ability to restrict entry or deport individuals because of their criminal activity. This is already possible – admittedly only in exceptional circumstances (although, this has recently been interpreted more flexibly).

One option to achieve these aims is to amend the Citizenship Directive. That would be problematic, as the directive is itself a codification of EU case law interpreting EU treaty rights.

More importantly, the only way to overrule EU court judgements is to amend the EU treaties. Whether such treaty change is advisable, or politically possible, remains an open question.

#### **Tobias Lock** | Legal Options for Meeting Reform Demands

Prime Minister Cameron's letter formulates three demands under the heading 'sovereignty'.

The first concerns the well-known desire to opt-out of 'ever closer Union'. This is laid down in the preamble and in Article 1 of Treaty on European Union (TEU), which notably refers to 'an ever closer Union among the peoples of Europe' – not necessarily among the Member States.

Be that as it may, David Cameron wants this opt-out to be achieved in a 'legally-binding and irreversible way'. Most realistically, this could be achieved through attaching a protocol to the treaties. This would avoid having to follow the procedure for treaty change laid down in Article 48 TEU.

The [Irish protocol](#) adopted after the first (negative) referendum on the Lisbon Treaty could serve as an example how to do this. Of course, any protocol would still need to be ratified by all the Member States.

Second, he is asking for a 'red card' mechanism to allow a group of national parliaments to block unwanted proposals for new EU legislation.

This would lead to a considerable strengthening of power for national parliaments. Currently, they can only raise concerns (which don't have to be followed) via the 'yellow card' and 'orange card' mechanisms.

Importantly, they can only challenge proposals on the principle of subsidiarity. This is fairly technical and ultimately reviewable by the European Court of Justice.

The letter is not clear whether the ‘red card’ should continue to be focused concerns about subsidiarity, or if it should be extended to cases where national parliaments object to a proposal for political reasons. In any event, this would require treaty change.

Third, David Cameron wants to see commitments to subsidiarity fully implemented.

It is not quite clear what he means by this. It seems that this is simply a political demand, which would not need legal implementation.

The same is probably true for the demand that ‘the UK will need confirmation that the EU institutions will fully respect the purpose behind the Justice and Home Affairs (JHA) Protocols.’

### **Michael Keating** | Implications for Scotland

David Cameron’s demands will affect all parts of the UK. There are three respects in which they may have a particular impact on Scotland.

The demand for national parliaments to have a veto over EU legislation is very vague and it probably adds nothing to existing qualified majority rules. Presumably, however, it would include national second chambers, such as the German *Bundesrat*, which represents the states in Germany. Could it then include the devolved legislatures of the United Kingdom? They do have more democratic legitimacy than the House of Lords.

The commitment to restrict EU migration is clear, even if the means are not. This goes against Scottish policy (under successive administrations) of encouraging inward migration of labour to Scotland.

There is also a pledge on deregulation, which implies reducing protections for workers. This presents a neo-liberal vision of Europe at odds with the idea of a ‘social Europe’, which is advocated both in Scotland and Wales.

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